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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 124

NORMAN G. ZACHARY and
EDWARD J. ZACHARSKI,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee

PETITION FOR REHEARING

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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Norman G. Zachary and Edward J. Zacharski, the appellants in the above-entitled cause, in which an order was rendered denying appellants' petition for writ of certiorari and which order was entered on the 10th day of October, 1960, file this their petition for rehearing and for the grounds thereof respectfully represent:

I.

That appellants claim that a substantial ground for rehearing of the appellants' petition for writ of certiorari exists because the sentence of the U. S. District Court, Eastern District of Michigan, Southern Division was based upon a void verdict and thus the said Court was without jurisdiction to render judgment of conviction.

II.

That appellants claim that there are no time limitations when considering a void verdict and that Rule 52 (b) of Plain Error applies.

III.

That appellants claim that the U. S. Court of Appeals, Sixth Circuit in its opinion reported in 275 F. 2d 793 (Appendix B of Petition for Writ of Certiorari, No. 124) fails to consider that which was argued to them with respect to the unlawful communication, namely, the operation of Rule 52 (b) Plain Error and resolved appellants argument of void verdict and plain error by overlooking and failing to consider one of the reasons for vacating of the sentence, to wit: that the verdict is invalid. This is contained in the original motion to vacate and set aside verdict.

IV.

That appellants claim that a void verdict requires no consideration, as given to it by the Court of Appeals to the effect that the District Court could draw an inference that the communication as made was not prejudicial.

V.

That appellants claim that the U. S. Court of Appeals did not give any consideration to the claim of petitioners that the verdict was void. This Court if certiorari be granted would be quick to hold that a verdict is and must be determined to be void when—

(a) The bailiff, admittedly, communicates with a jury concerning instructions of the Court (out of the presence of the Court).

(b) The bailiff, admittedly, communicates with a jury (out of the presence of the Court and without its consent) and in fact instructs them.

(c) The bailiff, admittedly, instructs the jury (out of the presence of the Court and without its consent) concerning their verdict.

(d) The bailiff, admittedly made public their deliberations and in ordering them back to the jury room when they were ready to give a verdict (on some counts) caused further deliberations to be no longer private. The verdict (after the unlawful communication) was no longer the jury's verdict under the law and the instructions of the Court but was the verdict of the jury under the instruction of the bailiff. This involves substantial, fundamental constitutional and human rights and goes to the very heart and essence of a fair and impartial trial.

VI.

The appellants claim that the U. S Court of Appeals (Sixth Circuit) failed to view the presumption of prejudice (unlawful communication to jury) as a presumption of law

dispensing with any ulterior inquiry. As the government did not refute the communication or rebut the presumption the Court had no discretion but to hold that the verdict was invalid or void. It could not supply that which the Government failed to do. The only inference the Court could draw from the fact of the communication was an inference of prejudice which is an inference of law.

VII.

The appellants claim that no Court could make an inference of no prejudice from the very presumption of prejudice and draw from it an inference sufficient to overcome the presumption. The Court had no jurisdiction to do so.

VIII.

The appellants say such a verdict as we find upon the record cannot sustain a sentence or judgment and same upon review, we grant, will be ordered set aside as an illegal sentence under the provisions of Rules of Criminal Procedure No. 35.

IX.

The appellants claim that the contention of an illegal sentence (made so because it is based upon a void verdict) is a substantial ground for review. That although this ground was available to petitioners it has not been previously presented as such (Rule 58 (2)).

X.

The appellants claim that the contention that there is involved a void verdict denying appellants of a fair and impartial jury trial is a substantial ground for review.

That although this ground was available to appellants it has not been previously presented as such (Rule 58 (2)).

XI.

The appellants claim that the contention that there are no limitations of time by Court Rule or otherwise preventing a review of a void verdict is a substantial ground and although referred to in the Petition for Certiorari (page 20) it was not stated or used therein as a ground (Rule 58 (2)).

XII.

The appellants claim that the contention that a void verdict gives the Court no jurisdiction to sentence or render judgment on the verdict is a substantial ground not heretofore stated to be a ground (Rule 58 (2)).

This petition is based upon the records and files in this cause.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the order of the U. S. Supreme Court entered October 10, 1960 denying appellants' petition for a writ of certiorari be upon further consideration reversed.

Respectfully submitted,

THEODORE G. ALBERT,
Counsel for Appellants.

Dated: October —, 1960.

CERTIFICATE OF COUNSEL

I, counsel for the above-named Norman G. Zachary and Edward J. Zacharski, do certify that the foregoing petition for rehearing is presented in good faith and not presented for purposes of delay or vexation, but is in my opinion well founded in law and fact and proper to be filed herein and this petition is restricted to the grounds above specified.

THEODORE G. ALBERT,
Counsel for Appellants.
Albert Building,
105-7 Suffolk Street,
Ironwood, Michigan.

Service of the above petition on ..... is hereby acknowledged this ... day of October, 1960.

.....,
Ass't U. S. District Attorney,
Attorney for Appellee.